Supreme Court, U.S.
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No. 00-1393

IN THE

Supreme Court of the United States

CO-STEEL RARITAN,

Petitioner,

v.

NEW JERSEY BOARD OF PUBLIC UTILITIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION OF RESPONDENT PUBLIC SERVICE ELECTRIC AND GAS COMPANY

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether a party's contractual rights have been impaired under the Contracts Clause by administrative agency action that ensures that the party: (a) continues to receive the economic benefit of its bargain throughout the contract term; and (b) enjoys the benefits of the introduction of competition in retail electricity markets, while sharing with all ratepayers the costs of that industry restructuring, both during and after the contract term?

2. Whether the Equal Protection Clause is implicated by administrative agency action to enforce the terms of a private contract, in furtherance of a legitimate governmental objective to place greater reliance on competitive markets for energy, and resulting in treatment of ratepayers that does not involve any suspect or quasi-suspect classification or impair any fundamental rights?

3. Whether the Due Process Clause is implicated by the decision of an administrative agency that was fully explained and based on a record developed in administrative proceedings in which all parties had full notice of what the agency sought to accomplish and ample opportunity to place their positions on the record, including the opportunity to take part in extensive live hearings, confront adverse witnesses, and submit voluminous written comments at all stages of the proceeding?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Public Service Electric and Gas Company, is a wholly-owned subsidiary of Public Service Enterprise Group Incorporated, which is publicly traded.

TABLE OF CONTENTS

	Page
Counterstatement of the Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Counterstatement of the Case	1
A. Regulatory context and the proceedings before the Board.	2
B. Throughout the Proceedings the parties were fully aware of (1) the parallel development of the Act; (2) the basis and reasoning underlying the Board's valuation of generation assets, including the role of the ALJ and the Board's Auditors in that process; and (3) the substantial evidence of record concerning the asset transfer.	8
C. The Board appropriately relied on the ALJ's comprehensive valuation decision and the substantial evidence of record as the basis for its Final Order.	11
Reasons for Denying the Writ	12
A. Co-Steel's contractual entitlements and expectations have not been altered or diminished in any sense and its contract clearly has not been substantially impaired by the Board's Final Order.	14

Contents

Page

B. The Board's decision to insulate Co-Steel's "Block 2" consumption from any stranded cost charges, and to enforce Co-Steel's contract as written in respect of that consumption, cannot give rise to a federal constitutional claim that Co-Steel has been deprived the equal protection of the law. 20

C. In light of the Board's reliance on extensive hearings conducted with the on-going development and passage of the Act, in which all parties were afforded notice and an opportunity to be heard in respect of all issues, this case does not pose any question about the limits that the Federal Constitution may place on the procedures followed by state administrative agencies. 24

Conclusion 27

TABLE OF CITED AUTHORITIES

Page

Cases:

Agricultural Products Corp. v. Utah Power & Light Co., 557 P.2d 617 (Idaho 1976) 18

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 14, 18

American Public Gas Ass'n. v. FPC, 567 F.2d 1016 (D.C. Cir.), *cert. denied*, 435 U.S. 907 (1977) 25

Bunker Hill Co. v. Washington Water Power Co., 561 P.2d 391 (Idaho 1977) 18

Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 22

Crema v. New Jersey Dep't. of Envtl. Protection, 94 N.J. 286 (1983) 25

DeSousa v. Reno, 190 F.3d 175 (3d Cir. 1999) 23

Energy Reserves, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983) 19

Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1 (D.C. Cir. 1976) 22

FCC v. Beach Communications, Inc., 508 U.S. 307 (1993) 23

Cited Authorities

Page

F.S. Royster Guano v. Virginia, 253 U.S. 412 (1920) 20

Goldberg v. Kelly, 397 U.S. 254 (1970) 25, 26

Graham v. Richardson, 403 U.S. 365 (1971) 22

Hill v. Colorado, 530 U.S. 703 (2000) 12, 13

Hodel v. Indiana, 452 U.S. 314 (1981) 22, 23

Levy v. Louisiana, 391 U.S. 68 (1968) 22

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 13

Minnesota Ass'n of Health Care Facilities, Inc., et al. v. Minnesota Dept. of Public Welfare, 742 F.2d 442 (8th Cir. 1984) 18

Nieves v. Hess Oil Virgin Islands Corp., 819 F.2d 1237 (3d Cir. 1987) 19

P.F. ex rel. B.F. v. New Jersey Div. of Dev. Disabilities, 139 N.J. 522 (1995) 21

RCA Global Communications, Inc. v. F.C.C., 559 F.2d 881 (2d Cir. 1977) 25

Reynolds v. Sims, 377 U.S. 533 (1964) 22

Schenck v. Pro-Choice Network of Western N.Y., 519 U.S. 357 (1997) 13

Cited Authorities

	Page
Securities and Exchange Comm'n v. Chenery Corp., 332 U.S. 194 (1947)	24
Smith v. Cahoon, 283 U.S. 553 (1931)	20
Tennessee Gas Pipeline Co. v. F.E.R.C., 17 F.3d 98 (5th Cir. 1994)	17
Texter v. Department of Human Services, 88 N.J. 376 (1982)	25
United States v. Florida East Coast Railway Co., 410 U.S. 224 (1973)	24
Wroblewski v. City of Washburn, 965 F.2d 452 (7th Cir. 1992)	22
United States Constitution:	
First Amendment	12
Statutes:	
N.J.A.C. 1:1-2.1	9
N.J.S.A. 48:2-13	9
N.J.S.A. 48:2-19	9
N.J.S.A. 48:2-21.29	9
N.J.S.A. 48:3-49 to 98	7
N.J.S.A. 48:3-50(a)(2)	23

Cited Authorities

	Page
N.J.S.A. 48:3-50(a)(12)	18
N.J.S.A. 48:3-50(b)(1)	23
N.J.S.A. 48:3-50(b)(2)	23
N.J.S.A. 48:3-50(c)(4)	18
N.J.S.A. 48:3-52(d)(1)	20, 21
N.J.S.A. 48:3-57(a)	16
N.J.S.A. 48:3-57(d)	16
N.J.S.A. 48:3-59	7
N.J.S.A. 48:3-61(a)	7
N.J.S.A. 48:3-62(a)	7
N.J.S.A. 48:3-98	7, 9
Court Rule:	
N.J. Court Rule 2:5-4(a)	9

COUNTERSTATEMENT OF THE CASE

The Petition for a Writ of Certiorari ("Petition") of Co-Steel Raritan ("Co-Steel" or "Petitioner") presents only issues of state law and policy without raising any genuine federal constitutional issue or compelling federal question, and, therefore, should be denied. While restructuring the electric utility business of Public Service Electric and Gas Company ("Public Service" or the "Company"), the New Jersey Board of Public Utilities ("Board") has at all times respected Co-Steel's contract with Public Service, and ensured that Co-Steel enjoys the benefits of the introduction of competition in New Jersey's retail electricity markets while bearing a share of the costs.

The Petition presents no valid grounds for this Court's review. First, Co-Steel's contract has not been impaired; rather, Co-Steel is receiving the full economic benefit of its bargain during the contract term. Second, the Equal Protection clause is not implicated. The challenged agency action is in furtherance of a legitimate governmental objective, and is predicated on the reasonable interpretation of a state statute by the administrative agency charged with its implementation. Any differential treatment alleged is based on a rational relation between the challenged classification and the legitimate objective furthered, and does not involve any suspect or quasi-suspect classification or impair any fundamental right. Finally, due process has been fully accorded. The determination by the Board of the value of the assets to be transferred to an independent unregulated affiliate of Public Service was based on substantial credible evidence in the record, adduced in the course of exhaustive and open proceedings in which Co-Steel actively participated.

By way of response to the Petitioner's Statement of the Case, this counterstatement presents the regulatory context in which Co-Steel entered into its power purchase contract, and summarizes the proceedings that Co-Steel alleges impermissibly

impaired that contract (point A).[1] The counterstatement then addresses the facts and procedural history that bear on the "procedural irregularities" alleged by Co-Steel (point B), and the basis of the Board's decision, which is clearly articulated in its Final Order (point C).

A. Regulatory context and the proceedings before the Board.

Paralleling developments in federal policymaking and in other states supporting the introduction of competition in wholesale and retail electric power markets, the New Jersey Energy Master Plan Committee ("Committee"), led by the Governor and the president of the Board, developed a formal policy framework, issued in March 1995, for the transition to competitive power markets. Accepting the Committee's recommendations, the Legislature enacted a statute in July 1995 that expressly authorized electric utilities to enter into "off-tariff" or discounted rate agreements with business customers in order to induce them to remain in New Jersey. App., 22a. Thus, at the time that Co-Steel's special contract became effective in November 1995 (App., 379a, 425a), all stakeholders in New Jersey were well aware of the move toward competitive markets; indeed, Co-Steel's market-based, discounted contract was itself reflective of and entirely consistent with this movement.

Moreover, beginning in June 1995 the Board embarked on what became a two-year effort to investigate and develop a long-term policy for implementing a competitive marketplace for electricity. The Board solicited and received input from all stakeholders and interest groups, including New Jersey's electric utilities, consumer groups, environmental interests, energy

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1. This history is also outlined in the comprehensive decision of the Appellate Division of the Superior Court of New Jersey ("Appellate Division"), which unanimously affirmed the Board decisions that are challenged here. *See* Appendix to the Petition ("App."), 20a-29a.

service companies, independent (non-utility) power producers and marketers, all classes of customers, labor interests, local government, and the New Jersey Division of the Ratepayer Advocate ("RPA"). App., 22a-23a. The outcome of this effort was a final report, dated April 30, 1997, entitled "Restructuring the Electric Power Industry in New Jersey: Findings and Recommendations" (the "Final Report"). In the Final Report the Board recommended that by October 1998, all retail electricity customers in New Jersey should have the ability to choose their own electric generation supplier in a competitive retail market. The Final Report also recommended that electric utilities provide rate reductions of up to 10% while retail competition was phased in.

Consistent with the objectives of the Final Report, the Board directed each of New Jersey's electric utilities to submit detailed filings, including a "restructuring" plan and a "stranded cost" petition. App., 24a. The restructuring plan to be filed by each utility involved, among other things, the separation of generation from regulated utility operations and the reliability of generation supply.[2] The stranded cost petition addressed the financial integrity of the utility and recoupment of its investment. It was required because under the original regulated system, each utility was required to supply electric generation to all retail customers in its service area. Each utility therefore had to make the substantial investments in generation assets and incur the operating risks necessary to provide safe and adequate service. The Final Report recognized that by virtue of the State's

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2. In the Final Report the Board noted that development of a fully competitive marketplace could be "best accomplished through the establishment of a separate, affiliated generation Company." Appendix to the Initial Brief of Appellant RPA to the Appellate Division ("RPA App."), 379a. The Board therefore specifically directed that in their restructuring plans each utility provide for the formation of a separate affiliated generation company or demonstrate that a separate entity would not be necessary. *Id.*, 422a-423a.

fundamental change in policy — which was unanticipated when utilities originally made these investments — certain of the utilities' generation assets would be rendered uneconomic or "stranded." A singular purpose of the "stranded cost" proceeding was to establish the market value (against book value) of the company's separate generation facilities as a basis for determining the utility's stranded costs.[3]

On July 15, 1997, Public Service submitted its proposals. The Board transferred the stranded cost filing to the Office of Administrative Law ("OAL") for hearings and initial determinations, while retaining the restructuring portion of the petition, including the separation of generation from regulated utility operations. The Administrative Law Judge ("ALJ") and the Board granted intervenor and participant status to numerous individual parties and interest groups representing the diverse concerns of utilities, energy suppliers, labor, environmental groups, and customers, including Co-Steel. *See* Petition at ii.

Over the second half of 1997 and into the first part of 1998, the parties submitted the testimony of numerous witnesses and engaged in extensive discovery in the respective restructuring and stranded costs proceedings (collectively, the "Proceedings") before the Board and the ALJ.[4] With regard to plant valuation, all parties, including the independent auditors selected by the Board ("Auditors") (App., 24a-25a) relied on a "discounted cash flow" or "DCF" analysis. Applying that methodology, the parties' experts proffered estimates of the market value of the Company's generation plants. Those estimates varied, due to the use of different "input" factors impacting the potential

3. In its filing the Company calculated its stranded generation assets at $3.9 billion, which the Board ultimately reduced by approximately $1 billion.

4. The history of the Proceedings is summarized in detail in the Board's August 24, 1999 Final Decision and Order ("Final Order") (App., 176a-180a) and in the decision of the Appellate Division affirming that Order (App., 24a-26a).

revenues to be generated by and/or costs incurred to operate the individual plants.[5] Another issue, apart from the valuation of the generation assets, related to the operational separation of those assets. Public Service proposed to retain its generation assets throughout an initial "transition period," and to then transfer them to a separate entity "as recommended in the [Final Report]."[6] In response to that proposal, several parties adverse to Public Service proposed a transfer *at the outset of competition* to assure prompt separation of generation from transmission and distribution.[7]

Forty days of evidentiary hearings were conducted by the OAL and the Board from February through May 1998, in which dozens of witnesses sponsored by the various parties in interest — including the Auditors — were subject to cross-examination.[8] In a comprehensive Initial Decision, the ALJ resolved the

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5. The DCF methodology as applied to utility property involves the determination of market value by estimating what a potential buyer would be willing to pay for a specific generating plant, based on an analysis of the revenues to be produced by that plant over its useful life, less total costs over the same time period. The net present value of the results represents the asset's market value. *See* App. 65a-66a, 186a-187a.

6. Appendix to the Initial Brief of Appellant New Jersey Business Users to the Appellate Division, 647a. *See also* transcript of the stranded cost proceeding, T87-88, 99-101.

7. *See* Transcript of the restructuring proceeding, T2887-90; Appendix to Public Service's Brief to the Appellate Division ("PS App."), PSa1404-07; Appendix to Public Service's Supplemental Brief to the Supreme Court of New Jersey, PSSsa81-87.

8. The cross examination of representatives of the Auditors on plant valuation/stranded cost issues can be found in the transcript of the stranded cost proceeding before the OAL, T3222-3524, T3629-3779, T3788-3966.

numerous methodological issues in dispute with respect to plant valuation. Reflecting detailed findings based on the evidence, the ALJ determined that the Company's assumptions be adopted with regard to certain aspects of the DCF analysis, and that alternative assumptions proposed by other parties be adopted with regard to other aspects.[9] However, because the ALJ did not have access to the parties' computer models, he suggested that the parties quantify the impacts of his recommendations.[10] They did so in written exceptions and reply exceptions to the ALJ's decision, but their proposed quantification differed.[11] The Board Staff therefore directed its Auditors — who had fully participated in the stranded cost proceeding before the ALJ, had prepared their own independent DCF valuation report on the Company's generating assets to which all parties had access, and were subjected to cross-examination on that report — to quantify the Company's stranded costs based on the ALJ's recommendations. The Auditors' quantification with supporting analysis was distributed to all parties in November 1998.

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9. The ALJ's Initial Decision with respect to these issues and others is summarized in the Board's Final Order. *See* App., 187a-189a. The full Initial Decision was before the New Jersey courts at RA App., 547a *et seq*. The portions of the Initial Decision resolving the methodological issues described above are at RA App., 555a-589a, 599a-605a.

10. The minority opinion of the Supreme Court of New Jersey, concurring in part and dissenting in part, states that the ALJ did not quantify the value of the Company's generation assets because at that time the Company intended to retain those assets through the transition period. Supplemental Appendix to the Petition ("Supp. App."), 33sa. That suggestion is incorrect. As the author of the minority opinion himself recognized, "[t]he issues in the stranded cost filings [before the ALJ] focused on . . . quantification of stranded costs." Supp. App., 21sa. A primary purpose of the stranded cost proceeding was to value the plants as of the date the assets were to become "stranded," *i.e.*, the date of the commencement of competition.

11. Relevant portions of these exceptions were before the New Jersey courts, PS App. at PSa876-946, especially PSa883-95.

Consistent with the Board's understanding announced in April 1997, electric industry restructuring legislation was developed while the open administrative Proceedings were being conducted.[12] On February 9, 1999, the Electric Discount and Energy Competition Act (the "Act") was enacted into law.[13] The Act established the framework, standards, and schedules for restructuring electric utilities in New Jersey, and directed that retail competition for all consumers, along with certain mandated rate reductions, be implemented by August 1, 1999. App., 27a. Confirming key standards that were applied by the Board in the on-going Proceedings, the Act provided express statutory authority for the utility to transfer its generation assets to an unregulated affiliate, and to recover its stranded costs through a "non-bypassable" charge of limited-duration, *i.e.*, a charge that must be collected from all customers — including new customers — that use the utility's distribution service, whether those customers take generation service from the utility or from an alternative provider. App., 27a (citing N.J.S.A. 48:3-59, -61(a), -62(a)). The Legislature also expressly authorized the Board, in implementing industry restructuring under the Act, to make use of the record developed in the Proceedings. *See* N.J.S.A. 48:3-98.

Following passage of the Act, certain parties sought to reopen and supplement the record, in effect seeking to relitigate certain issues, including plant valuation, and to introduce new evidence relating to the proposed sales of fossil fuel generating plants around the United States. App., 367a.[14] The Board denied the motion on March 25, 1999, finding there was ample

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12. Upon issuing the Final Report the Board announced that it was looking forward to working with the State's legislators "to craft legislation which will provide the foundation and necessary legal authority for the changes" it recommended. App., 24a.

13. N.J.S.A. 48:3-49 to –98.

14. Co-Steel took no position on this motion.

competent evidence in the record for its decision with respect to all issues, including the valuation of generation assets; that the proffered new evidence was irrelevant and speculative; and that the entire Proceedings had been conducted in contemplation of the restructuring outlined in the Act. App., 28a, 365a-373a.

At the direction of the Board, the parties then participated in settlement negotiations. Subsequently, two comprehensive settlement proposals were submitted, and all parties were provided the opportunity to submit comments on the alternative proposals. App., 181a–182a. Following review of the proposals and comments the Board, in a summary order issued on April 21, 1999, found the proposal of the group that included Public Service and several parties that had been adverse to it throughout the Proceedings ("Stipulation I") to be "more financially prudent and consistent with the Act's requirements" and with the record than the alternative proposal.[15] Accordingly, the Board adopted Stipulation I, with certain modifications, as "the framework for a reasonable resolution of these matters based on the record . . . ." App., 356a-357a. On August 24, 1999, the Board issued its Final Order which supplemented and elaborated on the April summary order. App., 165a-355a.

B. Throughout the Proceedings the parties were fully aware of (1) the parallel development of the Act; (2) the basis and reasoning underlying the Board's valuation of generation assets, including the role of the ALJ and the Board's Auditors in that process; and (3) the substantial evidence of record concerning the asset transfer.

The Petition misrepresents significant aspects of the Proceedings in order to contend that they were lacking in due process. In fact, all parties were on notice from the outset that the Proceedings would be conducted in parallel with the

15. *See* App., 28a (listing the parties to the alternative proposed resolutions).

development of legislation authorizing and validating competition in the electric industry.[16] As noted above, the Legislature clearly recognized the relevance of the evidence being adduced before the Board and expressly authorized use of the record developed in the administrative proceedings. N.J.S.A. 48:3-98. Thus, Co-Steel's contention that the Proceedings were conducted in the context of "a body of law that was soon to be radically altered" (Petition at 10-11) misstates — indeed completely distorts — the legislative decision to incorporate to the extent relevant the evidence developed by the Board.

Similarly off-the-mark is Co-Steel's characterization of the Board's valuation of Public Service's generating assets for the purpose of stranded cost recovery and valuing the assets transferred to Public Service's affiliate. All parties were aware of the purpose and significance of the plant valuation effort, which was extensively litigated before the ALJ. The parties had a full opportunity to analyze, interpret, and critique the ALJ's recommendations, and attempted, in their exceptions, to influence and persuade the Board. They also had substantial opportunity — for four months before the parties finalized their own stranded cost calculations in preparation of their settlement proposals, and for ten months before the Board's Final Decision — to critique and/or comment on the Auditors' quantification.[17]

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16. *See* note 12, *supra*. The Proceedings were conducted consistent with the Board's broad powers to regulate public utilities under New Jersey law. *See* N.J.S.A. 48:2-13, -19, -21.29. *See also* Supp. App., 6sa-7sa (opinion of the Supreme Court of New Jersey in this matter, discussing the scope of the Board's authority).

17. Co-Steel's contention that the Board relied on a report that was "never made part of any evidentiary record" (Petition at 11) is incorrect. *See* N.J.A.C. 1:1-2.1 (the "record" includes all documents "presented before, during and after the hearing and accepted by the judge for consideration in the rendering of a decision"); R. 2:5-4(a) ("[t]he record on appeal shall consist of all papers on file in the . . . agencies below").

In fact, Co-Steel completely misrepresents the role of the Auditors throughout the Proceedings, incorrectly stating that they had been subject to cross-examination only "on *restructuring* issues." Petition at 11, n.33 (emphasis in original). The record is clear that evidentiary hearings for the purpose of cross-examining the consultants that had prepared the independent audit report valuing Public Service's plants were conducted on three separate days in the stranded cost proceeding before the ALJ.[18]

Finally, Co-Steel's claim that the Board "permit[ted] PSE&G to materially amend its application after the hearing" (Petition at 11), to provide for the transfer of its generating assets to an unregulated affiliate at the outset of the shift to a competitive retail electricity market, is also highly misleading. In fact, the immediate transfer of newly-competitive generation assets out of the regulated utility operations to a separate company was proposed prior to and throughout the Proceedings. Reacting to proposals by several customer and supplier parties (*see* page 5 and note 7, *supra*), the Company acquiesced and agreed in Stipulation I to transfer the assets at the beginning of the transition period. The asset transfer was thus the product of arms-length negotiations among adverse parties rather than a unilateral proposal.

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18. *See* RA App., 658a; transcript of the stranded cost proceedings, T3222-3524, T3629-3779, T3788-3966. The minority opinion of the Supreme Court of New Jersey makes a similar error (Supp. App., 34sa-35sa), incorrectly suggesting that the consulting firm quantifying the ALJ's recommendation may have been a different entity than had taken part in the stranded cost proceeding. As the Board and the parties were well aware, those entities were one and the same. *See, e.g.*, App., 190a (noting that the Auditors' quantification of the ALJ's recommendations were made "using the models [the Auditors] sponsored during litigation" before the ALJ).

C. The Board appropriately relied on the ALJ's comprehensive valuation decision and the substantial evidence of record as the basis for its Final Order.

Co-Steel denigrates the Board's explanation of its valuation of Public Service's generating plants (Petition at 12) by simply ignoring several aspects of the Final Order. As noted above, the Auditors performed their calculations pursuant to the ALJ's detailed recommendations. The three plant valuation scenarios posed by the Auditors were based on the DCF methodology, and differed only with regard to their inflation rate assumptions. The intermediate scenario, which the Board adopted, was consistent with the ALJ's recommendation that the price of new electric capacity should be escalated at the anticipated general rate of inflation proposed by the RPA and not by Public Service.[19]

In its Final Order, the Board reviewed the ALJ's recommendations concerning all material factors bearing on the stranded cost quantification, and fully accounted for the parties' exceptions. *See, e.g.*, App., 187a-190a, 201a-208a. The Board emphasized the ALJ's "detailed and thorough" Initial Decision. App., 299a. The Board then further reviewed the ALJ's treatment of the "proposed adjustments and assumptions of the parties" and formally "adopt[ed] the ALJ's Initial Decision with respect to the magnitude of PSE&G's net-of-tax owned generation stranded costs," as quantified by the Auditors. App., 314a-317a.

The Appellate Division correctly recognized that "[t]he [Board] explained its reasons for adopting the [DCF] methodology and there is absolutely no doubt there was substantial evidence in the record to support its findings on valuation based on that method." App., 70a. The Supreme Court of New Jersey, in its opinion affirming the Appellate Division,

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19. RA App., 586a-587a, 1070a.

similarly noted that the Board's valuation and stranded cost determinations were "based on years of fact-finding and extensive quasi-judicial and quasi-legislative proceedings" in which "[t]he parties participated fully and vigorously at all stages." Supp. App., 16sa. Co-Steel's claim that the Board's valuation was made without explanation or reference to the "evidence in the record of" the stranded cost proceeding (Petition at 12) ignores the ALJ's extensive recommendations, which the Board adopted except as modified in its own Order. Co-Steel also ignores the backup provided to the parties with the Auditors' calculations.[20]

REASONS FOR DENYING THE WRIT

Stripped of its conclusory rhetoric, the sole reason offered by the Petitioner for the Court to grant this extraordinary writ is that this case is "important." However, the Petition fails to identify a single cognizable or compelling federal constitutional issue implicated by this case.

As a preliminary matter we note that the Petition's numerous "blind" citations to inapplicable case law highlight its fundamental shortcomings. For example, *Hill v. Colorado*, 530 U.S. 703 (2000), on which Petitioner relies, involved a direct challenge to the constitutionality of a state statute that violated fundamental First Amendment rights by restricting free speech within 100 feet of a health care facility. The case was not simply "important", as Petitioner alleges; it raised significant and substantial federal questions concerning whether the reasoning in another recent decision of this Court, which involved a

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20. Similarly, in this electric restructuring matter involving billions of dollars, Co-Steel now complains that the Board failed to sufficiently explain why it made a $9 million *reduction* in the Company's stranded costs. Petition at 12-13. However, the Board clearly explained that adjustment, which benefits ratepayers and was detrimental to the Company. *See* Brief of Public Service (N.J. S.Ct.) at 59-60 (September 20, 2000).

different provision restricting free speech, was properly applied by the state court in *Hill*.[21] The Petitioner argues, with a "string citation," that there is authority supporting the proposition that this Court should decide cases that present a question as to whether prior decisions of this Court have been properly interpreted and applied.[22] Yet, the Petition fails to demonstrate that any decisions of this Court or principles of constitutional law have been improperly interpreted or misapplied in this case.

Moreover, the alleged federal constitutional issues Co-Steel urges were for the most part completely undeveloped in the New Jersey courts, whose decisions were based on state law and in which federal constitutional issues were peripheral and insubstantial. Thus, this case does not provide this Court with the kind of thorough treatment of the issues that it ought to have before granting certiorari. In contrast, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), on which Petitioner relies, involved a challenge to a state statute barring a property owner from building any permanent habitable structures on his land, and which the state court, after extensive consideration, determined rendered that property valueless. Despite Petitioner's conclusory allegation that this case similarly involves "substantial" property interests of Co-Steel and others (Petition at 16), there is in fact no identification or analysis, either in the Petition or in the vast record below, of precisely what those alleged property rights are.

While all cases decided by state supreme courts are important to the parties involved (and to the states), that is an insufficient basis on which to grant the extraordinary writ sought here, in the absence of any genuine federal constitutional issue to be decided. The following sections demonstrate that

21. *See Hill, supra*, 530 U.S. at 712-14 (citing *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357 (1997)).

22. *See* Petition at 16, n.52.

Co-Steel's specific claims in respect of impairment of contract, equal protection, and due process present no genuine federal constitutional issues.

A. Co-Steel's contractual entitlements and expectations have not been altered or diminished in any sense and its contract clearly has not been substantially impaired by the Board's Final Order.

It is well-settled that challenges to state action under the Contract Clause must be based on "substantial" impairment, and that "[m]inimal alteration of contractual obligations may end the inquiry at its first stage." *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978). Where, as here, there is no impairment whatsoever, the claim plainly does not warrant review by this Court.

Pricing under Co-Steel's power supply contract is divided into two "Blocks." Petition at 8. The basis of the Board's decision concerning Co-Steel's alleged contractual rights could not have been clearer: (1) under its contract, Co-Steel's Block 1 usage is to be billed based on the Company's "then effective" HTS tariff, which is subject to the "non-bypassable" stranded cost charges;[23] (2) even when those stranded cost charges are included, HTS customers like Co-Steel, along with all other customers, are to receive substantial net rate reductions mandated by the Act; and (3) Co-Steel's Block 2 usage (approximately two-thirds of Co-Steel's consumption) will continue to be governed by the contractual discounted rate, "vary[ing] hourly with changes in the Public Service's marginal energy cost," plus certain additional charges, and will thus be unaffected by the Final Order — neither stranded cost charges nor mandatory rate reductions will apply. On balance, "Co-Steel

23. App., 33a, 333a-334a, 424a. Co-Steel has acknowledged that a tariff rate, such as the HTS, "prospectively is subject to change at any time by the utility with the regulator's approval." Brief of Appellant Co-Steel Raritan (N.J. Sup. Ct., App. Div.) at 18 (December 10, 1999).

will be receiving power at a net price lower than that originally bargained for as a result of this [Final] Order." App., 32a-33a, 333a-334a.[24]

Thus, the Board found that Co-Steel's contract was simply not impaired.[25] The Appellate Division agreed, concluding that "the contract impairment argument is undermined by Co-Steel's failure to include contingencies for post-contract charges," even though Co-Steel was well-aware at the time it entered into the contract that electric industry restructuring was on the horizon. App., 34a. Co-Steel's argument that its contract "constitutes an agreement [by Public Service] to recover . . . less than the amount to which it would otherwise have been entitled to earn on its *previous* investment" (Petition at 9 (emphasis in original)) is completely unsupported by the terms of its contract, which are unaffected by the Final Order.

Similarly misleading is Co-Steel's suggestion that the Final Order unfairly imposes stranded cost charges on Co-Steel that "essentially equal[] or exceed[] the . . . $60 million cost reduction that Co-Steel obtained" through its contract. Petition at 9-10. Even assuming that Co-Steel's claim regarding the annual amount of the stranded cost charges is correct, it is

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24. Co-Steel's claim that it is *not* receiving power under the Final Order at a lower net price then it bargained for (Petition at 19) is simply incorrect. For example, Co-Steel actually bargained for and its contract explicitly provides for the inclusion of future increases in "demand side management charges" of which Co-Steel now complains (Petition at 19, n.61); the discounts provided under the Act and the Final Order clearly benefit Co-Steel relative to what it would otherwise pay under its bargained for contract. *See* App., 101a, 107a.

25. *See also* App., 105a-106a (Board Order denying Co-Steel's motion for reconsideration, and clarifying that under the Final Order Co-Steel's bargained for agreement remains in place, with appropriate adjustments to the HTS tariff only; that tariff "is not designed, any more than any other tariff is designed, to insulate customers from future additional charges relating to the provision of service").

undisputed that Co-Steel's total contract rate will decline, notwithstanding those "charges", during the period of mandatory rate reductions under the Act. In addition, most of the alleged $60 million in stranded cost charges would be payable, according to Co-Steel, during the period of "ten or more years beyond the Contract term." Petition at 10. During that period, of course, Co-Steel will be free to exercise the option it considered before entering into the contract — leaving Public Service's system and moving its operations out-of-state — in which case it will not pay any stranded cost charges or have any other obligation to Public Service.[26]

It is true that if it chooses to remain on the Company's distribution system, Co-Steel will be obligated — like all other Public Service customers using that system — to pay the Company's distribution rate, including any stranded cost charges. However, Co-Steel's claim that the "practical effect" of that distribution rate is "an outright prohibition on switching," which "will be economically infeasible" (Petition at 10), is not only completely unsupported anywhere in the record, but is based on a misrepresentation of the intended benefits of competition. Like any other distribution customer, Co-Steel's decision whether to switch generation suppliers will be based on a comparison of Public Service's *generation* rate with that of alternative suppliers.[27] The distribution charge, which includes stranded cost charges, will be due to Public Service in either event, and will have absolutely

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26. Co-Steel will also be free at that time to leave Public Service's distribution system by generating its own power, and would in that case similarly avoid stranded cost and other utility charges. Thus, Co-Steel's suggestion that the Final Order has resulted in the imposition of a "post-contract surcharge" (Petition at 20-21) is incorrect.

27. Under the Act, that generation rate will be based on Public Service's cost of procuring generation supplies in the competitive wholesale market, and will thus be outside the utility's control. *See* N.J.S.A. 48:3-57(a), (d); App., 344a-345a.

nothing to do with Co-Steel's decision whether or not to choose an alternative generation supplier.

In an effort to create the impression that its contractual expectations were actually modified under the Final Order, Co-Steel suggests that the Board's decision was based on certain provisions of its contract on which the Board allegedly relied in "permit[ing] the imposition of stranded cost charges." Petition at 17. As clearly set forth in the Final Order and in the Order denying Co-Steel's motion for reconsideration (*see* App., 105a-106a), the Board did not rely on those provisions; there was no need to do so — the contract was simply not impaired but, rather, was enforced under its plain terms.

Moreover, even if the Board had determined that the terms of the contract actually permitted the imposition of stranded cost charges as a "modification", that interpretation of the parties' intent was clearly reasonable and cannot give rise to a constitutional claim. As the Appellate Division recognized, the contract by its express terms was "subject to present and future" laws and regulations, and therefore "Co-Steel knew that its contractual rights were subject to alteration by state legislation." App., 34a. It is apparently Co-Steel's position that this provision simply acknowledges the state of the law, that the contract "could just as well have been silent on the subject," and that the State's exercise of its acknowledged power to modify contract rights still "must be reasonable." Petition at 18-19. Co-Steel does not demonstrate that allowance of stranded cost recovery is unreasonable or inconsistent with this provision. It would, for reasons that are completely unexplained, read this provision completely out of the contract, in violation of well-settled principles of contract interpretation.[28] Co-Steel's reliance

28. *See, e.g., Tennessee Gas Pipeline Co. v. F.E.R.C.*, 17 F.3d 98, 102-103 (5th Cir. 1994) ("the goal of contract interpretation is to determine the parties' intentions by harmonizing and giving effect to each provision within the contract such that none is rendered meaningless").

on the requirement that modifications be "reasonable" is also misplaced, as Co-Steel acknowledges that: (1) even when stranded cost charges are included, Co-Steel's rates will decline under the Final Order during the period of rate reductions required under the Act; and (2) the State's sanction of stranded cost collection by utilities serves legitimate legislative purposes. App., 35a.[29] Finally, Co-Steel's blind citation to a list of cases demonstrating only the *possibility* in other circumstances that *some* public authority *might* be found to have unconstitutionally impaired a contract (Petition at 19, n.59) highlights Co-Steel's inability to explain why this Board, in this case, has done so. Indeed, even a cursory examination of the cases cited by Co-Steel demonstrates that they are readily distinguishable from the case at the bar.[30]

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29. Co-Steel has acknowledged that the collection of stranded costs "provide[s] for a smooth transition from a regulated to a competitive power supply marketplace" and "maintain[s] the financial integrity of the electric public utility through the transition to competition." Brief of Appellant Co-Steel Raritan (N.J. Sup. Ct., App. Div.) at 32 (December 10, 1999) (citing N.J.S.A. 48:3-50(a)(12), -50(c)(4)).

30. *See Allied Structural Steel S.V. Spannaus*, 438 U.S. 234, 246-50 (1978) (involving state statute that required a current recalculation of 10 years of prior contributions to a pension plan based on a new, unanticipated vesting requirement, in a field "never before subject to regulation by the State"); *Minnesota Ass'n of Health Care Facilities, Inc., et al. v. Minnesota Dept. of Public Welfare*, 742 F.2d 442, 450-51 (8th Cir. 1984) (striking down portion of the statute that retroactively required refund of charges not unlawful at the time they were collected, and upholding those provisions of the statute with prospective application); *Bunker Hill Co. v. Washington Water Power Co.*, 561 P.2d 391, 395-97 (Idaho 1977) (reversing commission's attempt to *increase* contract rate in order to bring it to a level uniform with other customers' rates); *Agricultural Products Corp. v. Utah Power & Light Co.*, 557 P.2d 617, 621-25 (Idaho 1976) (same).

Co-Steel's remaining arguments in support of its contract impairment claim are similarly misplaced. For example, in the absence of any impairment, Co-Steel's claim that the restructuring "could just as effectively [have] been carried out *without* impairing the contract" (Petition at 21) is self-serving and tautological. Co-Steel is simply saying that it should be exempt from the requirements of restructuring because it has a contract and that restructuring could be accomplished without its inclusion in the process. Yet if Co-Steel were "excluded," all other customers of Public Service would have to shoulder Co-Steel's share of the stranded cost charge.

Moreover, Co-Steel's veiled suggestion that its exclusion from the restructuring regime is required because of the State Attorney General's "approval" of the contract (*id.*) distorts both the facts and the law. The State did not "agree" to exempt Co-Steel from its fair share of the costs of restructuring. As the Appellate Division recognized, and Co-Steel apparently does not dispute, the real *parties* to the contract are Public Service and Co-Steel. App., 35a. In *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1243 (3d Cir. 1987), on which Co-Steel relies, the court held that where, as here, the government is not a party to the contract allegedly impaired, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.* (citing *Energy Reserves, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412-13 (1983) (internal quotations omitted)).

B. The Board's decision to insulate Co-Steel's "Block 2" consumption from any stranded cost charges, and to enforce Co-Steel's contract as written in respect of that consumption, cannot give rise to a federal constitutional claim that Co-Steel has been deprived the equal protection of the law.

Co-Steel's appeal to the language of "equal protection" is a pretextual effort to manufacture a federal constitutional issue where none exists. The Petition's lone reference to "equal protection" in the last sentence of Co-Steel's brief point (*see* Petition at 21-25), is wholly undeveloped and supported solely by a blind citation to two decisions of this Court. In contrast to those cases, any "differential" treatment of Co-Steel and other ratepayers in this case has a rational basis related to the purpose of the Act.[31]

As a preliminary matter, the Board's interpretation is consistent with the statutory language. In subsection 4(d)(1) of the Act (N.J.S.A. 48:3-52(d)(1)), the Legislature intended to reduce the rates of customers receiving service under tariffs providing for fixed rates (*e.g.*, HTS rates) to which a "percentage reduction" versus rates on April 30, 1997 could logically be applied. The "April 30, 1997" rate in the case of Co-Steel's Block 2 usage was not a fixed tariff rate, but was

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31. The Petition at 25, n.71. cites *Smith v. Cahoon*, 283 U.S. 553 (1931) (striking down a statute requiring certain private carriers to obtain insurance and formal approvals but exempting others (*e.g.*, those exclusively carrying agricultural products) from those requirements, where there was no justification for distinguishing between the classes, and the regulation was wholly arbitrary), and *F.S. Royster Guano v. Virginia*, 253 U.S. 412 (1920) (striking down a state tax system exempting entirely the income derived from outside the state by local corporations that do no local business, where the classification had "no fair or substantial relation to the proper object sought to be accomplished" and the unequal operation of the taxing system was in fact due to inadvertence rather than design).

instead a heavily discounted market-based rate subject to hourly variation with change in the Company's "marginal energy cost." App., 102a. While Co-Steel would obviously prefer a rate that is ten percent lower than the hourly market-based rate at all times, the statute clearly bases the required rate reductions on class-wide rates at a fixed point in time, and Co-Steel's "preferred" result is thus inconsistent with the language of the Act.[32]

Co-Steel's appeal to the "well understood" meaning of the term "customer class" for purposes of interpreting subsection 4(d)(1) is also unavailing. The fact that Co-Steel takes its service under Public Service's EHEP tariff, and that that tariff "appears as Sheet No. 85 in PSE&G's published tariffs" (Petition at 23, n.69) does not define or create a "customer class" for the unrelated purposes of the rate reduction.[33] Similarly, Co-Steel's reliance on the Board's new supplier licensing regulations and the fact that Public Service reports the usage of entities served under the EHEP tariff as "customers" on its FERC Form 1 (Petition at 23, n.69) begs the question of whether and how a rate reduction under the

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32. Co-Steel's reliance on *P.F. ex rel. B.F. v. New Jersey Div. of Dev. Disabilities*, 139 N.J. 522 (1995) (see Petition at 22 n.68) is completely off the mark. In that case the court recognized that "courts typically defer to statutory interpretations by administrative agencies," and that such deference is inappropriate only where the agency's interpretation "clearly conflicts with the intent of the Legislature." *Id.* at 529. The agency's decision in that case not only directly contravened the intent of the Legislature, but completely ignored the "abundantly supported conclusions" of the administrative law judge.

33. Tariff Sheet No. 85 itself clearly provides that "[s]ervice under this rate schedule is available on an individual contract basis," that "the customer's cost of energy will vary hourly" with changes in "marginal energy cost," and that "[a]ll other terms of the service are described by the contract." *See* App., 420a–421a.

Act should apply to a particular customer taking service under a contract rate.[34]

Finally, by focusing its Petition on these challenges to the Board's statutory construction, Co-Steel completely ignores the standards governing equal protection claims.[35] A statutory provision distinguishing between customers subject to a fixed tariff (such as the HTS rate) and those taking power under a market-based, floating contract rate does not result in a suspect or quasi-suspect classification, and does not impair any party's fundamental rights.[36] Therefore, the provision would be subject to "rational basis" review, under which it must be upheld if "any set of facts reasonably may be conceived to justify" the challenged classification. *See Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992). *See also Hodel v. Indiana*, 452 U.S. 314,

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34. Co-Steel's reliance on four out-of-state cases (Petition at 23, n.69), all of which are distinguishable (*see* Brief of Public Service (N.J. Sup. Ct., App. Div.) at 96, n.116 (January 5, 2000)) similarly does not support its claim that the Board has misinterpreted the New Jersey statute at issue in this case.

35. Co-Steel also improperly ignores the well-settled principle requiring a reviewing court to accept an agency's reasonable interpretation of an ambiguity in a statute the agency is charged with administering. *See* note 32, *supra*. *See also Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1 (D.C. Cir. 1976) (considerable deference is owed to interpretation of statute, particularly a new statute, by the agency charged with its administration).

36. "Suspect" classification under the equal protection clause includes classification based on race, nationality, or alienage. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971). "Quasi-suspect" categories that have been implicitly recognized by the Court include gender and illegitimacy. *See, e.g., Levy v. Louisiana*, 391 U.S. 68 (1968). "Fundamental" rights include the right to privacy and the right to vote. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

331 (1981) ("[s]ocial and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose"). Classification involving neither fundamental rights nor suspect qualifications is accorded a strong presumption of validity. *See, e.g., FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993). Moreover, "[o]nce a facially legitimate reason for the classification is found, whether such a reason was articulated by Congress or not, [the court] must rule the classification constitutional." *DeSousa v. Reno*, 190 F.3d 175, 184-85 (3d Cir. 1999).

Enforcement of Co-Steel's market-based, discounted Block 2 rate under its contract without further rate reductions is entirely consistent with and rationally related to the legislative purposes underlying the Act. Specifically, the Act established a State policy to "[p]lace greater reliance on competitive markets . . . to deliver energy services to consumers," and the Legislature specifically found that "traditional utility rate regulation is not necessary" in the "competitive electric generation . . . market [that] has developed" in New Jersey. N.J.S.A. 48:3-50(a)(2), -50(b)(1), (2). As discussed above, Co-Steel's market-based contract rate is itself a result of these trends and related legislation pre-dating the Act. Co-Steel in fact acknowledges the basis of the distinction drawn by the Board:

> [T]he distinction . . . between Co-Steel's tariff and those applicable to everybody else was based upon the fact that Co-Steel's Block 2 purchases are based on market prices. This is true.

Petition at 24.

Application of the rational basis test (which Co-Steel completely ignores) should be the end of the "equal protection" analysis. In light of the Board's rational implementation of the legislative purpose of the Act and the lack of any constitutionally cognizable discriminatory treatment alleged by Co-Steel, there is simply no reason to grant the Petition on equal protection grounds.

C. In light of the Board's reliance on extensive hearings conducted with the on-going development and passage of the Act, in which all parties were afforded notice and an opportunity to be heard in respect of all issues, this case does not pose any question about the limits that the Federal Constitution may place on the procedures followed by state administrative agencies.

The due process clause is not designed to provide a dissatisfied litigant the opportunity to isolate alleged deficiencies in an administrative agency's approach to resolving a complex, multi-faceted matter. In light of the exhaustive, comprehensive, open Proceedings described above, Co-Steel's conclusory references to "boilerplate" language concerning the requirements of due process (Petition at 25) cannot justify further review by this Court.

Courts normally defer to an administrative agency's choice of the type of proceedings through which the agency informs itself and acts, so long as the selection is responsive to the purpose and function of the agency. *See Securities and Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 202-203 (1947). For example, *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 241-42 (1973), involved a challenge to a fee established by the Interstate Commerce Commission ("ICC") after a "notice and comment" period. The affected party claimed that the statute, which stated that the fee was to be established after a "hearing", required an oral evidentiary hearing. Because the parties "had fair notice

of exactly what the [ICC] proposed to do, and were given an opportunity to comment, to object, or to make some other form of written submission," this Court held that the hearing requirement had been satisfied. Consistent with these principles, administrative agencies may fashion their proceedings flexibly to accomplish their regulatory mission. *See, e.g., RCA Global Communications, Inc. v. F.C.C.*, 559 F.2d 881, 887 (2d Cir. 1977) (holding that the statutory requirement of a "full hearing" in a proceeding to establish a formula governing the distribution of telegraph traffic was satisfied by a "notice and comment" procedure involving written submissions by interested parties); *American Public Gas Ass'n. v. FPC*, 567 F.2d 1016, 1064-67 (D.C. Cir.), *cert. denied*, 435 U.S. 907 (1977) (nationwide rates for natural gas sales, under statute requiring agency to fix rates after a hearing, may be established through notice and comment procedure without cross-examination or examination under oath of those making written submissions). New Jersey law is entirely consistent with these principles of administrative law enunciated by this Court and applied by lower federal courts and agencies.[37]

As it does throughout the Petition, Co-Steel provides numerous "blind" citations in support of its "due process" argument without suggesting how or why the cases cited apply to the facts at hand. Again, closer scrutiny reveals that those cases uniformly fail to support Co-Steel's positions. For example, *Goldberg v. Kelly*, 397 U.S. 254 (1970), on which Co-Steel relies, struck down procedures permitting the termination without prior notice or hearing of welfare benefits to which the complainants were entitled by statute.

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37. *See, e.g., Texter v. Department of Human Services*, 88 N.J. 376, 385-86 (1982); *Crema v. New Jersey Dep't. of Envtl. Protection*, 94 N.J. 286, 299 (1983) ("[a]dministrative agencies enjoy a great deal of flexibility in selecting the proceedings most suitable to achieving their regulatory aims," and a "high degree of discretion in exercising that choice reposes in the administrative agency") (citations omitted).

In light of the extensive opportunity granted to all parties to be heard in this case, *Goldberg* is clearly inapplicable.[38]

All parties in this case, including Co-Steel, had a full understanding of the substantive and procedural standards applicable to the Proceedings, fair notice of the matters to be determined, and ample opportunity to place their positions on the record — including the opportunity to take part in extensive live hearings, confront adverse witnesses, and submit voluminous written comments at all stages. The Board's decisions were based solely on evidence in the record and the rationale underlying all aspects of the Final Order was clear. The Board's procedures in this matter clearly satisfied the requirements of due process.

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38. Moreover, Co-Steel has not attempted, either in its Petition or anywhere in the vast record below, to identify the property or other interest, analogous to the statutory entitlement to the "means for daily subsistence" at issue in *Goldberg*, *supra*, 397 U.S. at 255, 261-64, that it believes the due process clause of the federal constitution would be required to protect in this case.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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